Supreme Court, U.S.
FILED
MAY 25 2011
OFFICE OF THE CLERK

No. 10-1301

In the Supreme Court of the United States

HARRISTON LEE BASS, JR.,
Petitioner,

v.

STATE OF NEVADA
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION

CATHERINE CORTEZ MASTO
ATTORNEY GENERAL OF THE STATE OF NEVADA
THOM GOVER
CHIEF DEPUTY ATTORNEY GENERAL
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
SPECIAL PROSECUTIONS DIVISION
555 E. WASHINGTON AVE., STE. 3900
LAS VEGAS, NEVADA 89101-1068
P: (702) 486-3120
F: (702) 486-2377
TGover@ag.nv.gov

May 25, 2011 *Counsel for Respondent*

Becker Gallagher · Cincinnati, OH · Washington, D.C · 800.890.5001

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

FACTS 1

ARGUMENT 2

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Corbin v. State,
111 Nev. 378, 892 P.2d 580 (1995) 2

Strickland v. Washington,
466 U.S. 668 (1984) 3

Statutes

NRS 174.511 3

NRS 174.515 3

NRS 200.010 4

NRS 453.011 4

NRS 453.321 4

NRS 453.333 4

NRS 453.552 4

FACTS

The state supreme court in its Order affirming the conviction of Dr. Harriston Lee Bass, Jr. ("Bass") set forth the facts of his case as follows. A jury convicted Dr. Harriston Lee Bass, Jr. of second-degree murder for selling a controlled substance that caused Gina Micali's death, 49 counts of selling a controlled substance, and 6 counts of possession of a controlled substance for the purpose of sale. After trial, a bag of prescription medications, which had been the State's proposed Exhibit 12, was examined and opened by both parties at Attorney Edward Bernstien's office who was handling a wrongful death suit related to this proceeding. Because the bag allegedly contained all of the medications that Bass dispensed and sold to Micali on October 4, 2005, he moved for a new trial or dismissal based on newly-discovered evidence, arguing that the State's theory that Micali died from medication Bass dispensed and sold to her on October 4 was no longer viable.

The state high court identified the issues before it on appeal as follows: (1) several jury instructions were erroneous; (2) the statutes under which he was charged and convicted are unconstitutionally vague; (3) three of the counts of which he was convicted are redundant; (4) the State's failure to preserve and collect evidence denied him due process; (5) the district court abused its discretion when it allowed testimony about a financial analysis regarding the prescription drugs he sold; (6) he was prejudiced by judicial misconduct; (7) the district court abused its discretion when it denied his motion to continue the trial; (8) the prosecutor had a conflict of interest; (9) he was prejudiced by prosecutorial misconduct; (10) the State

failed to present sufficient evidence to support his conviction of selling controlled substances to Samuel Baker; (11) his sentencing was based on inadmissible, false, and inflammatory evidence; and (12) the district court abused its discretion when it denied his motion for a new trial or dismissal based upon newly discovered evidence.

ARGUMENT

QUESTION 1.

To the extent that Bass claims that his counsel was ineffective, he is improperly raising a collateral claim on direct review. In n.4 of its Order of Affirmance the state high court stated:

> We note that Bass argues that he received ineffective assistance of counsel. This issue, however is not appropriate on direct appeal. See *Corbin v. State*, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995) ([T]his court has consistently concluded that it will not entertain claims of ineffective assistance of counsel on direct appeal.")

The state high court refused to hear this claim because it was improperly brought before it. Bass cannot raise a claim of ineffective assistance of counsel on direct review.

To the extent that Bass is arguing that, when the state district court denied his motion to continue, the state district court forced him to go to trial when his attorney was unprepared and **the district court** thereby deprived him of the right to counsel, this claim

is raised for the first time on appeal. In Question 1, Bass contends that he "was denied his right to counsel by being forced to trial when his attorney was admittedly unprepared." Bass failed to raise this federal question before the state courts. In his direct-appeal Opening Brief, Bass only argued the federal claim that his trial counsel was ineffective because he wasn't prepared to proceed, as the following statements from his appellate brief show: 1) his claim or Issue No. 1 was titled "Unprepared or Ineffective Assistance of Counsel"; 2) he argued that "[E]ven the best attorney can't be effective if he's unprepared"; and 3) he cites to *Strickland v. Washington*, 466 U.S. 668 (1984), to support his argument that his trial counsel was ineffective because he was unprepared. If Bass is alleging that the state district court deprived him of the right to counsel when it denied his motion for a continuance and forced him to go to trial when his counsel was unprepared, he is improperly raising this claim for the first time in the Supreme Court.

Further evidence that Bass did not raise the above federal question in the state courts is found in the fact that he only appealed the district court's denial of the request for a continuance as an abuse of discretion under state law, *i.e.*, NRS 174.511 and NRS 174.515; Bass raised no federal claim related to the continuance. Bass' request for the continuance was based on his allegation that counsel hadn't had time to re-organize the documents the State had provided. The state supreme court, applying state law, found that the documents had been available to the defense for eight months, and further found that the claim had no merit because Bass had failed to show he was prejudiced by the district court's denial of the motion. Although Bass argued below under NRS 174.511 and NRS

174.515 that the district court abused its discretion when it denied his motion for a continuance, he never argued below that the district court deprived him of his right to counsel when it denied the motion to continue.

QUESTION 2.

In Question 2, Bass argues that "the Nevada statutory scheme pursuant to which Dr. Bass was prosecuted and convicted of murder" was unconstitutionally vague and indefinite. NRS 200.010 is not unconstitutionally vague because it clearly puts an ordinary person on notice that if he sells a controlled substance in violation of Chapter 453 of the Nevada Revised Statutes, and that controlled substance causes another's death, he commits murder. NRS 453.321 clearly provides that, except as authorized by the provisions of NRS 453.011 to 453.552, inclusive, a person who sells or dispenses a controlled substance commits a felony. Bass was not authorized or licensed to dispense or sell controlled substances, only to prescribe them. NRS 453.333 clearly puts an ordinary person on notice that he commits murder if, in violation of NRS Chapter 453, he sells or makes available a controlled substance which proximately causes the death of another. Bass' quote of NRS 453.333 contains a typographical error; he omitted the bolded portion below; said statute provides in pertinent part as follows:

> If the death of a person is proximately caused by a controlled substance which was sold, given, traded or otherwise made available to him . . . by another person **in violation of this chapter, the person** who sold, gave or traded

> or otherwise made the substance available to him. . . is guilty of murder.

In sum, Dr. Bass unlawfully sold a controlled substance which proximately caused Gina Micali's death. The statutes under which he was convicted are not constitutionally vague.

QUESTION 3.

In Question 3, Bass makes two arguments: 1) his conviction was based upon the introduction and advocacy of false evidence; and 2) prosecutorial misconduct amounted to a *Brady* violation. Both allegations hinge upon what Bass terms as the "newly-discovered" evidence in proposed trial Exhibit 12.

The first part of Question 3 fails to state a federal claim. At page 2 of his petition for writ of certiorari, Bass states that his third (false evidence) question primarily involves due process considerations, but in Question 3 itself, he does not allege a constitutional violation. Although he raised due process claims in the state courts, these claims only pertained to Investigator Amanda Burney's failure to preserve and collect the prescription bottles and the pills therein which she found at the victim's residence, and the victim's blood sample. Bass raised no other due process violations below in the state courts.

Should the first part of Question 3 raise a federal claim, Bass' claim, that "the prosecution's entire theory was that the hydrocodone which caused Gina Micali's death was dispensed by Dr. Bass two days earlier," has no merit. The criminal information charged Bass with having committed the crime of

second degree murder between June 2005 and October 2005. The State's theory regarding this charge was based on the following facts and evidence. Bass held himself out as a licensed medical doctor who made house calls twenty-four hours a day, seven days a week. Bass' business was called DOCS-24-7; he advertised in the yellow pages as a pain management specialist. Although Bass was licensed to prescribe drugs containing hydrocodone, he was not licensed to dispense or sell them. Bass' medical records revealed that Bass had visited Gina Micali from June to October 2005, and had sold her four (4) Allscripts prescription bottles every sixty (60) days. Three of the bottles each contained one hundred pills and the fourth bottle contained ninety pills. Bass also wrote prescriptions for approximately three hundred additional pills during each visit. Bass' records also showed that on October 4, 2005, two days before Gina was found dead in her home, Bass visited Gina's house and sold her three Allscripts prescription bottles. The lot numbers on these records matched several of the empty Allscripts bottles recovered by Joey Micali. The State attempted at trial to introduce the bottles confiscated by Joey Micali as State's Exhibit 12, but defense counsel objected during a side bar conference. As a result, the State relied upon Bass' medical records to show that he had sold Gina prescription drugs on October 4, 2005. Bass testified during the trial. He admitted that all the medical records introduced into evidence were records he maintained. He also admitted that he visited Gina on October 4, 2005, and sold her Allscripts prescription pills as reflected in her medical records. Bass was the only medical doctor to visit Gina at her home between June and October 2005. Bass was the only doctor to illegally sell prescription drugs with hydrocodone to Gina. The

Allscripts prescription bottles recovered from Gina's house were labeled DOCS 24-7. Bass admitted at trial that he visited Gina's house between June and October 2005, sold her prescription drugs with hydrocodone throughout this period and sold her these prescription drugs on October 4, 2005. Contrary to Bass' argument, Amanda Burney never testified that she knew for certain that the Allscripts prescription bottle with the label DOCS 24-7 and recovered on October 6, 2005, was the same bottle Bass sold to Gina on October 4, 2005. This evidence is not false and is corroborated either by Bass' own admissions while testifying at trial or by Gina Micali's medical records.

In his second argument, Bass makes a vague prosecutorial misconduct (*Brady* violation) claim. He appears to claim a *Brady* violation related to Exhibit 12, when not only did he know about the evidence in Exhibit 12, he objected to its admissibility. Preliminary-hearing proposed Exhibit 13 and proposed trial Exhibit 12 were the same item: three bottles of Xanax and five bottles of Norco which the victim's brother, Joey Micali, had taken out of the victim's home a few days after her death. Bass knew about this evidence before trial. During the preliminary hearing the prosecutor attempted to admit said prescription bottles but the defense successfully objected. Also during the preliminary hearing the prosecutor provided Bass with a document that indicated that the victim's brother Joey told Detective Reubart that he had given attorney Gary Call the prescription bottles Joey had retrieved from the victim's home. The prosecutor also provided Bass with a letter from Call to Reubart stating that Call had turned over eight Allscripts bottles to Reubart. During trial, leading up to the State's attempt to introduce

proposed Exhibit 12, the victim's brother testified he had put the prescription bottles he retrieved from his sister's home in a brown bag; the court sustained Bass' objection and did not admit Exhibit 12 as evidence. There was no *Brady* violation or prosecutorial misconduct.

CONCLUSION

The Court should deny Bass' Petition for Writ of Certiorari because he has failed to present any compelling reason for the Court to hear his claims. His collateral claim of ineffective assistance of counsel cannot be raised on direct review. To the extent Bass argues that the district court denied him the right to counsel, he failed to raise this federal claim in the state courts. The Nevada statutory scheme under which Bass was prosecuted and convicted is not constitutionally vague because it clearly puts an ordinary person on notice that he commits murder if, in violation of NRS Chapter 453, he sells or makes available a controlled substance which proximately causes the death of another. Bass' argument that his conviction was based upon the introduction and advocacy of false evidence fails to state a federal claim because it alleges no constitutional violation. The prosecution's theory was based not only upon Bass' unlawfully dispensing medication to the victim two days before her death, but also upon Bass' visiting the victim every sixty (60) days from June 2005 to October 2005 and during each of said sixty-day visits 1) dispensing four (4) Allscripts prescription bottles which contained a total of three hundred and ninety (390) pills and 2) writing prescriptions for approximately an additional three hundred (300) pills. Bass' vague prosecutorial-misconduct (*Brady* violation)

claim related to proposed trial Exhibit 12 has no merit because not only did Bass know about the evidence in proposed Exhibit 12, he objected to its admissibility of its contents and prevented them from being admitted at the preliminary hearing and at trial. Bass' asserted errors consist of erroneous factual findings or the misapplication of a properly stated rule of law. The Court should deny his Petition for Writ of Certiorari.

DATED this 25th day of May, 2011.

Respectfully Submitted,

CATHERINE CORTEZ MASTO
Attorney General of the
State of Nevada

THOM GOVER
Chief Deputy Attorney General
Counsel of Record
Nevada Bar No. 5648
Office of the Attorney General
Special Prosecutions Division
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101-1068
P: (702) 486-3120
F: (702) 486-2377
TGover@ag.nv.gov

Counsel for Respondent